Supreme Court, U.S.
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No. 98-1812

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ of Certiorari to the

Supreme Court of Virginia

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

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PETITIONER'S REPLY BRIEF

The Court has jurisdiction to issue certiorari to the Supreme Court of Virginia on petitioner's Question 4. This Reply is necessary because respondent incorrectly contends in its Brief in Opposition that petitioner waived his claim underlying Question 4 by inadequately presenting it in his appellate brief to the Virginia Supreme Court. Respondent's Brief in Opposition at 20-21. Respondent also states that in any event, petitioner waived his claim with respect to the Federal Bureau of Investigations ("FBI"). Id. at 19-20.

Contrary to respondent's assertions, the federal question presented by petitioner's Question 4 was ***ruled upon*** by the Virginia Supreme Court. Respondent argued to the Virginia Supreme Court that petitioner had waived review of the claim presented by Question 4, Supplemental Appendix at 2-3, but the court rejected respondent's waiver argument and held:

> "We have considered these so-called arguments [Assignments of Error Numbers 2 and 73] and find no merit in...them."
>
> Appendix at 4, ¶ 2.[1]

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[1] Compare Appendix at 4, ¶ 1 (the court addressing other arguments raised by petitioner ruled "[petitioner] assigned 92 errors allegedly committed by the trial court...and has not argued many of them...; hence, they are waived and will not be

The Virginia Supreme Court's ruling addressed the trial court's orders with regard to documents held by ***both*** the CIA and the FBI. Appendix at 4, ¶ 2; see also Assignments of Error Numbers 2, 3, 30, 73 and 88 at Supplemental Appendix at 1. Petitioner's Assignments of Error Number 73 states: "The [trial court] erred in denying [petitioner's] motion to compel discovery when the material in the custody of agents of the Federal Government and the Commonwealth's Attorney did not even attempt to investigate what that evidence was since these Federal Agents stated the information was classified and confidential." Supplemental Appendix at 9.

Admittedly, petitioner's assignments of error and accompanying argument are not elaborate. Nor need they be. Beck v. Alabama, 447 U.S. 625, 630-631, n. 6 (1979); see Lebron v. National R.R. Corp., 513 U.S. 374, 379 (1995) ("[o]ur practice 'permit[s] review of an issue not pressed so long as it has been passed upon....' ", quoting United States v. Williams, 504 U.S. 36, 41 (1992)). However, the record from the trial court—also before the Virginia Supreme Court—clears any ambiguity and shows that the constitutional question at stake in Question 4 was directly and vehemently contested. See Appendix at 67 ("I don't find there's any jurisdiction of a state court to hold a federal official in contempt for failing to respond to a state court's subpoena"), 362-385, 399-422. Because the record shows ample factual and legal debate on the federal issue presented in Question 4, the Virginia

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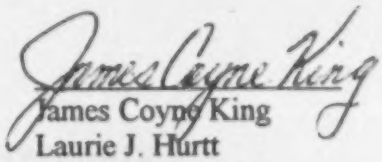
considered"). Assignments of Error Numbers 2 and 73 were not among the errors waived.

Supreme Court was able to, and this Court can and should, fully consider the issue. See Illinois v. Gates, 462 U.S. 213, 223 (1983) (existence of adversarial dispute in record indicates that appellate court's decision on federal question is informed).

Wherefore, petitioner respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX
SUPPLEMENTAL APPENDICES A AND B

SUPPLEMENTAL APPENDICES

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX A

Excerpt from Opening Brief of Appellant submitted by Petitioner to the Virginia Supreme Court dated July 2, 1998: Assignments of Error 1

SUPPLEMENTAL APPENDIX B

Excerpt from Brief of the Commonwealth submitted by Respondent to the Virginia Supreme Court dated August 12, 1998 [Pages 10-11] 2

SUPPLEMENTAL APPENDIX A

Excerpt from Opening Brief of Appellant submitted by Petitioner to the Virginia Supreme Court dated July 2, 1998:

ASSIGNMENTS OF ERROR

....

2. The Circuit Court erred in not holding the CIA in contempt for failure to respond to a valid subpoena.

3. The Circuit Court erred in forbidding certain questions at the 20 October 1997 suppression hearing as to the involvement in the forcible abduction by foreign nationals.

....

30. The Circuit Court erred in refusing to permit counsel for Kasi to examine the notes Agent Garrett used to refresh his recollection prior to his testimony.

....

73. The Circuit Court erred in denying defendant Kasi's motion to compel discovery when the material in the custody of agents of the Federal Government and the Commonwealth's Attorney did not even attempt to investigate what that evidence was since these Federal agents stated the information was classified and confidential.

....

88. The Circuit Court erred in not holding that the Commonwealth had duty to give notice in advance of the existence of certain classified information prior to the 27 October 1997 hearing on the motion to suppress.

SUPPLEMENTAL APPENDIX B

Excerpt from Brief of the Commonwealth submitted by Respondent to the Virginia Supreme Court dated August 12, 1998:

[Pages 10-11]

II. KASI HAS WAIVED ALL OF THE ASSIGNMENTS OF ERROR THAT HE HAS FAILED TO BRIEF

An appellant waives any assignment of error that he fails to brief in a meaningful fashion. See Barnabei v. Commonwealth, 252 Va. 161, 165 n.1, 477 S.E.2d 270, 272 n.1 (1996), cert. denied, 117 S.Ct. 1724 (1997); Rule 5:27. Kasi has failed to address Assignments of Error 5, 14, 15, 17, 20, 21, 25, 26, 28, 32, 47, 61, 73, 77, 78, 79, 80, 91, and 92 in *any* fashion.[1] Moreover, his brief does no more than simply articulate Assignments of Error 2, 7, 16, 18, 19, 22, 23, 24, 27, 29, 30, 43[2], 45, 51, and 54 in a completely conclusory manner. (Def. Br. 3 n.2; 33 n.29; 41n.35). All of the

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[1] Assignment of Error 91 which Kasi filed in this Court on May 1, 1998, challenged the trial court's decision to permit a camera in the courtroom. Assignment 92 concerned the dismissing of a show cause order against the Immigration and Naturalization Service (INS). In the list of Assignments that Kasi has included in his brief, however, he has dropped the former No. 91 and renumbered the former No. 92 as No. 91. See Sheppard v. Commonwealth, 250 Va. 379, 385, 464 S.E.2d 131, 135 (1995) (improper to change Assignments of Error), cert. denied, 517 U.S. 1110 (1996). In any event, neither claim has been briefed and, therefore, both are waived.

[2] Even if this claim were not defaulted, it has no merit. See Cox v. Commonwealth, 227 Va. 324, 329 n.4, 315 S.E.2d 228, 231 n.4 (1984) (subpoena duces tecum in criminal case does not apply to material in possession of investigating arm of the Commonwealth).

assignments, therefore, are waived by Kasi's failure to present any argument or citation of authority in support of his claims.[3]

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[3] Several of the claims Kasi has failed to brief are doubly defaulted because, even if he had briefed them, he failed to preserve them at trial. For example, with respect to Assignment of Error 15, Kasi expressly stated on the record that he had "no objection" to Detective Miller's testimony as an expert regarding bullets traveling through automobile glass. (App. 3187). Rule 5:25. Likewise defaulted is Assignment 22 because Kasi expressly stated that he had no objection to the admissibility of Commonwealth's Exhibit 32. (App. 3253). Rule 5:25. And, Assignments 14 and 28 are waived because, after Kasi's objections to the documents in question were overruled, he proceeded to elicit information from the same documents which he considered to be favorable to his case. (App. 3156-59, 3404). See generally Hubbard v. Commonwealth, 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992) (objection waived by introducing evidence "of the same character").